

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 13 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

V.

ABISAI MESA HERNANDEZ,

Defendant - Appellant.

No. 05-30047

D.C. No. CR-04-02018-LRS

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of Washington
Lonny R. Suko, District Judge, Presiding

Submitted January 24, 2006^{**}
Seattle, Washington

Before: RAWLINSON and CLIFTON, Circuit Judges, and MARSHALL^{***},
Chief District Judge.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

^{***} The Honorable Consuelo Bland Marshall, Chief District Judge, Central District of California, sitting by designation.

1. The district court did not abuse its discretion in denying Abisai Mesa Hernandez's motion to appoint substitute counsel, because the motion was made only days before trial, the district court's inquiry into Hernandez's request was adequate, and there was no conflict. *See United States v. Franklin*, 321 F.3d 1231, 1238-39 (9th Cir. 2003).
2. The evidence presented at trial was sufficient for the jury to find Hernandez guilty of conspiracy. *See United States v. George*, 420 F.3d 991, 998-99 (9th Cir. 2005).
3. The district court's determination denying a "minor participant" adjustment was not clearly erroneous in view of the evidence reflecting the extent of Hernandez's involvement. *See United States v. Cordova Barajas*, 360 F.3d 1037, 1042 (9th Cir. 2004).
4. Given that the district court explained that he imposed the 121-month sentence due to the "mandatory provisions" of the law, the sentence is remanded. *See United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005).

The conviction is **AFFIRMED**; the sentence is **REMANDED**.